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No. 95-84

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

October Term, 1995

Cuban American Bar Association, Inc., et al.,

Petitioners,

vs.

Warren Christopher, Secretary of State, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.6, petitioners hereby reply to the Government's Opposition to their Petition for a Writ of Certiorari. Nothing in that Opposition casts doubt on the conclusion that the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit should be vacated, because the case has become moot through the Government's unilateral actions.

I. This Case is Moot

Respondents' May 2, 1995 policy statement announcing its unilateral decision to parole in all Cuban refugees from Guantánamo renders this case moot. Because the District Court never certified the Cuban detainees as a class, the only refugees involved in the instant lawsuit were ten individual detainees, of whom only two still remain on Guantánamo: Nestor Rodriguez Labori and Jovani Miguel Fiffe Pino. The Government claims that the case is not moot, solely because these two have "not yet entered into the parole process," a process over which respondents obviously exercise exclusive control. Br. for Respondents in Opposition ("Opp.") at 9. Yet in fact, both individuals have already completed *all relevant process*, as both have now participated in a campwide "lottery" of parolees held in August, and have drawn their final departure dates from Guantánamo.[1] Presumably, respondents could not keep this case artificially alive by *deliberately* delaying the last two plaintiffs' departure until after this Court disposed of their cert petition. Neither should respondents avoid mootness by unilaterally deciding when and where Labori and Pino should be paroled into the United States, but setting those dates so that they arise only after the Court disposes of this petition.

Respondents seek to avoid mootness by asking this Court "to treat the district court's order as *de facto* certifying the class action," although

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[1]Just this week, the MIAMI HERALD reported that on August 11, 1995, the U.S. military conducted a supposedly random "lottery system [among the eight remaining camps on Guantanamo] to determine who among some 10,000 rafters would leave the camps first...." Mirta Ojita, *Guantanamo's camps could be empty as early as January*, MIAMI HERALD, Sept. 16, 1995, at 3B. Apparently, residents of Guantanamo Camps One and Two have already arrived in the United States. From now on, "flights will continue at the same pace –three flights a week each carrying 172 rafters." *Id.* We are informed by their families that both Pino and Labori participated in the putative lottery, that Pino is at the fourth camp in line to leave Guantanamo, with a November 1995 departure date, while Labori is in the fifth camp in line to leave, with a December 1995 departure date.

conceding that our class "was not formally certified by the district court." Opp. at 9. This claim is refuted by the Government's repeated insistence throughout that this suit is *not* a class action.[2] Nor can the Government reconcile its newly minted claim that Labori and Pino have become uncertified, *de facto* class representatives with its claim below that "the legal status of the named plaintiffs here is far different from that of any person who may have reached the United States," a category that will shortly include *all* of the Guantánamo detainees. Reply Brief for Appellants to the Eleventh Circuit at 10.[3]

Finally, the decision below is undeniably moot as regards the Cuban Refugee Service Organization ("CRSO") Petitioners, who no longer require nor seek access to Guantánamo now that their detainee clients are being released. As the District Court's opinion on the temporary restraining order makes clear, the CRSO petitioners sought First Amendment access to their individual detainee clients for one purpose only: to counsel them regarding their chances of coming to the United States and any decisions to repatriate "voluntarily" to Cuba.[4] Now that all Guantánamo detainees have departure

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[2]The Government's brief to the Eleventh Circuit refers to the group as a "putative class," Brief for Appellants to the Eleventh Circuit ("Br. App.") at 19, and identifies the plaintiffs as "1) *several migrant Cubans*, in the safe haven provided by the United States at its military base in Guantanamo, Cuba and Panama, who have *not* asked to be returned to their homes in Cuba; and 2) several legal services organizations." *Id.* at 8-9 (emphasis added). The Government reminded the Eleventh Circuit that "[t]he class has not been certified and the named plaintiffs clearly fail the requirements of Rule 23 of the Federal Rules of Civil Procedure." *Id.* at 18. Far from insisting that the individual plaintiffs represented all detainees, the Government argued that those individuals *lacked standing* to represent certain Cuban migrants detained on Guantanamo who had declared their wish to repatriate to Cuba. *Id.* at 13, 17-18.

[3]Similarly, respondents' disingenuous claim that we are "free to attempt to add additional migrants as class representatives" to keep class claims alive, Opp. at 9, omits the fact that an Eleventh Circuit order dated December 19, 1994 "stayed all further proceedings in the district court, including discovery," as well as all further efforts to seek class certification. *CABA v. Christopher*, Pet. App. at 11a.

[4]See Pet. App. at 36a-37a ("the plaintiffs' main contention, for purposes of this Motion, is that the government is denying the attorneys their First amendment rights and the detained plaintiff refugees substantive and due process rights by denying them access to their attorneys. Consequently, the plaintiffs argue that the 'voluntary'

dates to come to the United States, their lawyers no longer have any need for access or counseling on Guantánamo.

The fact that some Cuban detainees still on Guantánamo may have originally requested these service organizations' representation, Opp. at 9-10, cannot keep the First Amendment access question alive. The Government's May 2 policy change entirely mooted those requests, and eliminated any need for the legal service organizations to travel to Guantánamo to meet with and counsel these individuals. Because these individuals, like Labori and Pino, will soon arrive in the United States, their needs for counseling, as well as the attorneys' First Amendment rights, can be addressed by meetings that are held here.

II. The Government States the Wrong Standard for Evaluating Vacatur

The Government concedes that "[w]here it appears upon appeal that the controversy has become entirely moot, it is the *duty of the appellate court to set aside the decree below.*" *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936)(per curiam), *cited in* Opp. at 11 (emphasis added). Nor does the Government deny that just last Term, in *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 115 S.Ct. 386, 392-393 (1994), this Court ruled that "vacatur *must* be granted where mootness results from the unilateral action of the party who prevailed in the lower court." *Id.* at 390 (emphasis added). Nevertheless, respondents disingenuously seek to avoid that rule by arguing the mootness of the case will not result from "'unilateral' actions by the government" because "the parole of Cuban migrants (including any of the named plaintiffs) into the United States reflects a volitional act on their part," i.e., their willingness to come to the United States. Opp. at 14 n.6.

In fact, Pino and Labori have been ready and willing to engage in such a "volitional act" for more than a year, since they first fled to the United States from Cuba by boat in the summer of 1994. The only reason they have not entered the United States, and under the Cuban Adjustment Act already been granted permanent resident status, is that Respondents

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repatriation of the refugees cannot in fact be voluntary absent the advice of counsel and informed consent." (footnote omitted)); *id.* at 37a n.3 ("At this stage, the court is only considering the issue of right to access and whether the Cuban refugees are being denied the opportunity to be fully informed, thus, preventing voluntary repatriation.").

interdicted them on the high seas, held them in detention for more than a year, and will now apparently release them only *after* this Court has disposed of our petition for certiorari. For more than a year, the Government unilaterally restrained and restricted plaintiffs' freedom. It is the Government's unilateral lifting of that restraint and scheduling final departure dates for the two plaintiffs -- not any acts of Labori's or Pino's -- that renders this case moot, and appropriate for this Court's vacatur.

Citing only past practices of their own office – and a vacatur standard they concede "this Court has never expressly endorsed," Opp. at 11-13 – respondents claim that this Court cannot vacate a judgment below without first fully evaluating the certworthiness of the pending petition to determine whether it meets S. Ct. Rule 10's standard for plenary review. Respondents offer scant evidence that their threshold test has ever governed this Court's vacatur practice, which was designed in part precisely to *avoid* the need to make such certworthiness determinations.[5]

Nor does it make sense that this Court, when confronted with a case

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[5]The treatise upon which respondents rely says only that in recent years, the Court has "seemingly accepted" such suggestions from the Solicitor General. R. Stern, E. Gressman, S. Shapiro & K. Geller, SUPREME COURT PRACTICE 724 (7th ed. 1993). But if this Court has accepted this position, "it has never said" so. *Commodity Futures Trading Comm'n v. Bd. of Trade*, 701 F.2d 653, 657 (7th Cir. 1983) (Posner, J.)). In support of this Court's "seeming acceptance" of their own briefs, respondents cite extensively to three cases in which this Court in fact rejected the Government's position on vacatur en route to disposing of the case. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425 (1993)(per curiam) (dismissing certiorari as improvidently granted without reaching the merits of the position argued for by the Government); *U.S. Bancorp Mortgage Corp. v. Bonner Mall Partnership*, 115 S.Ct. 386 (1994) (invalidating routine practice of vacating decisions pursuant to settlement pending appeal and rejecting central proposition argued for by Government); *Keough v. American Policyholders Ins. Co., cert. denied*, 114 S.Ct. 682 (1994) (refusing to vacate despite Government's urging that a prior decision should be vacated because the case would have warranted the Court's review had it remained live). The very treatise upon which the Government relies elsewhere notes that Supreme Court "orders vacating cases as moot do not say whether the Court might have been likely to grant certiorari," R. STERN, ET AL., *supra*, at 724 n.29, and pronounces that "the practice of vacating the judgment below [upon mootness] is binding on the courts of appeals *as well as the Supreme Court.*" *Id.* at 723 (emphasis added).

mooted on appeal, must invariably perform an *ex post facto* thought experiment as to whether the case *would have* merited certiorari had it not been mooted. Such a rule would condemn this Court to endless summary line-drawing between some parties who would be deemed "validly" to have lost their chance at reviewability, and others similarly situated who kept that chance. Precisely to avoid such line-drawing, this Court has long followed a practice of regularly vacating cases that become moot after the court of appeals renders its judgment and before the Court grants the petition for writ of certiorari.[6]

Vacatur is particularly appropriate when mootness results from a change in the legal framework governing the case caused by the unilateral action of the party who prevailed below. "[I]n instances where the mootness is attributable to a *change in the legal framework governing the case* ... [this Court's] practice is to vacate the judgment and remand for further proceedings in which the party may, if necessary, amend their pleadings or develop the record more fully." *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (482) (1990) (emphasis added).[7] No less than a legislative enactment, respondents' May 2nd policy change has similarly resolved the immediate controversy and changed the legal framework of the case. The Government now intends to parole in all Cubans from Guantánamo, where before none of the detained Cubans could even apply for parole and asylum status. This

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[6]See, e.g., *Sivley v. Soler*, 113 S.Ct. 454 (1992) (granting, vacating, and remanding to the Court of Appeals for the Ninth Circuit with directions to dismiss); *Yellow Freight System, Inc. v. United States*, 113 S.Ct. 31 (1992) (same); *City Gas Co. v. Consolidated Gas*, 499 U.S. 915 (1991) (same); *Dillon v. Allegheny Corp.*, 499 U.S. 933 (1991) (same); *Onwuasoanya v. United States*, 488 U.S. 920 (1988) (same); *SEC v. Board of Trade*, 459 U.S. 1026 (1982); *Alabama v. Davis*, 446 U.S. 903 (1980) (same); *Hopper v. Barnett*, 439 U.S. 1041 (1978) (same). In all these cases, the mooting event occurred *before* this Court granted the petition for a writ of certiorari, and it "seems a fair inference, ... that most of them involve mooting events occurring after the court of appeals decision." 13A Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure: Civil* § 3533.10 n. 31 (1984).

[7]Far from challenging this conclusion, the Government's *amicus* brief in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425 (1993) at 14, acknowledged that vacatur for mootness is appropriate "when a legislative enactment resolves the immediate controversy."

legal change renders vacatur fully appropriate without regard to whether the case would ever have warranted plenary review on *certiorari*. Nor do respondents convincingly distinguish the case most directly on point: this Court's decision granting, vacating, and remanding a case involving facts nearly identical to these: the Second Circuit's decision in *Haitian Ctrs. Council v. McNary*, ("*McNary II*") 969 F.2d 1326 (2d Cir. 1992), *vacated as moot on other grounds sub nom., Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993). As our petition notes, at 12-13, *McNary II* raised an issue identical to that here: whether the First Amendment required that American lawyers be given access to more than 200 Haitian clients then being detained on Guantánamo. As here, the Government chose to release the Guantánamo detainees before this Court acted on the Solicitor General's petition, and twice told this Court that the case having "become moot prior to the Court's disposition of the petition for certiorari, *the proper course would be to vacate the decision of the Second Circuit, not to deny the petition. See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)."[8]

If, as the Government claims, this Court based its vacatur in *McNary II* on an implicit finding that the First Amendment issue was certworthy, surely the same issue suffices here to support the grant of the petition, vacatur and remand with instructions to dismiss the judgment below.[9]

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[8]Reply Brief for the Petitioners at 10, *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (No. 92-528) (emphasis added), Pet. App. at 79a. Accord, Supplemental Brief for the Government Petitioners at 3, *Sale v. Haitian Ctrs. Council, Inc.*,113 S.Ct. 3028 (1993) (No. 92-528) ("the proper disposition in the event of mootness is not to deny the petition, but rather to grant the petition and *vacate* the judgment of the court of appeals as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950)") (emphasis added), Pet. App. at 80a.

[9]If anything, the circuit split on the First Amendment issue has intensified since *McNary II*, now that both the Second Circuit and the U.S. District Court for the Eastern District of New York have held for the legal services organizations on the issue, while the Eleventh Circuit in this case ruled the opposite way. Compare *McNary II* and *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993) (vacated by settlement), with *Cuban American Bar Ass'n, et. al. v. Christopher, et al.*, 43 F.3d 1412 (11th Cir. 1995).

III. Equitable Factors Require Vacatur Of The Eleventh Circuit's Erroneous Decision, Which Misapplied Controlling Circuit And Supreme Court Precedents

As this Court made clear last term in *U.S. Bancorp*, "a party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 391-92. The question on vacatur is not whether a now-dead case was ever certworthy, but whether equitable factors now demand vacatur.[10] As our petition fully demonstrated, Pet. at 15-26, at least four such factors exist:

A. *Judicial Even-Handedness:* Respondents are U.S. Government officials, with broad, unilateral power to moot suits brought against them via policy decisions implemented through Executive announcement and without Congressional approval. Throughout the Haitian and Cuban refugee litigations, the Government has exploited its unique position as a litigant and policymaker to invoke the *Munsingwear* doctrine to avoid the adverse precedential effect of lower court decisions. Pet. at 16. Particularly when this Court has previously exercised its vacatur power to void other circuit precedent on an issue, equity requires that it vacate the decision under review to ensure that the Government cannot benefit from unreviewed advantageous precedent, should it elect to engage in similar conduct in the future.

B. *First Amendment*: The Government seeks to minimize the Panel's startling declaration that "the First Amendment does not apply to the migrants or to the [American] lawyers at Guantánamo Bay...." Pet. App. at 29a. Opp. at 20. Read literally, this holding would permit the Government to bar American citizens on Guantánamo not just from speaking to their Cuban clients, but also from speaking to other Americans there, from writing open letters, criticizing the President, or even engaging in religious worship. By refusing even to consider Petitioners' First Amendment claim of impermissible viewpoint-based discrimination, Pet. App. at 29a, the Court of Appeals effectively licensed the Government to engage in intentional viewpoint-based discrimination against U.S. lawyers on Guantánamo.

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[10]Even accepting *arguendo* the Government's claim that this Court should evaluate the certworthiness of an entirely moot case, as our petition demonstrated, this case also easily meets that standard. Pet. at 15-26.

The Government denies that it discriminated against Cuban Legal Services Organizations, citing general access to Guantánamo it granted to Amnesty International and World Relief Organization. Opp. at 22. Yet neither of these organizations was afforded what our clients sought: one-on-one interviews with refugee clients for the purpose of giving them legal advice.[11] By granting some organizations greater access based on their organizational purpose (which was not to render legal advice), the Government necessarily discriminated against organizations such as CABA, who were barred precisely *because* their organizational purpose was to advise and counsel the detainees. Such differential treatment based on organizational purpose squarely violates this Court's directive that the Government may not discriminate against speech to suppress a disfavored viewpoint.[12]

Nor can the Government repeal the First Amendment just because the speech occurs on a military base,[13] or outside United States territory.[14] Even in a nonpublic forum, the Government may not "suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). Finally, the Government makes no effort to reconcile the Eleventh Circuit's ruling with this Court's decision last Term in *Florida v. Went for It, Inc.*, 115 S. Ct. 2371 (1995), which reaffirmed that the political (as opposed to commercial) speech of attorneys merits full First Amendment protection.[15] Vacatur is

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[11]*See* Dep. of Stewart Moneymaker at 25 (Nov. 22, 1994) (Amnesty International was "absolutely not" to provide legal services to the migrants); Dep. of Robert Zaperach 53-58 (Nov. 22, 1994) (World Relief Organization was allowed onto Guantanamo not to give legal advice, but because of its ability to assist the government in caring for the migrants).

[12]*See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147-48 (1993) ("'[T]he First Amendment forbids the Government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'").

[13]*Flower v. United States*, 407 U.S. 197, 198-99 (1972) (Government cannot abridge First Amendment rights of civilians on military base).

[14]*Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (First Amendment's religion clause applies extraterritorially).

[15]See 115 S.Ct. at 2381 (O'Connor, J.) ("we will accord speech by attorneys on public issues and *matters of legal representation the strongest protection our Constitution has to offer*") (emphasis added).

thus warranted, if only to require the Panel to reconsider its ruling in light of this Court's intervening decision in *Went For It, Inc.*.

C. *Legal Rights of Detainees on Guantánamo:* While defending particulars of the Eleventh Circuit opinion, the Government nowhere defends the full implications of Panel's startling ruling that Cuban and Haitian refugees on Guantánamo and Panama "are without legal rights that are cognizable in the courts of the United States." Pet. App. at 31a. As we earlier noted, this language would theoretically free American officials deliberately to terrorize those refugees, to starve them, to subject them to forced abortions and sterilizations, and to discriminate against them based on the color of their skin. U.S. officials could apprehend innocent refugees inside U.S. territorial waters and confine them forever, without legal rights and any processing, in punitive offshore detention camps under exclusive U.S. jurisdiction and control.

The Government now denies that this could legally happen, citing provisions of the Uniform Code of Military Justice, 10 U.S.C. § 877 and 18 U.S.C. § 7, to bar officials at Guantánamo from mistreating alien detainees. Opp. at 20 n.12. But this argument establishes, rather than disproves, our claim that Guantánamo cannot be a "rights-free zone" to which no U.S. law applies. If, as the Government now concedes, U.S. *statutes* reach extraterritorially to prohibit military personnel on Guantánamo from committing murder (10 U.S.C. § 918), manslaughter (10 U.S.C. § 919), maiming (10 U.S.C. § 924), unlawful detention (10 U.S.C. § 897), or conduct unbecoming an officer and a gentleman (10 U.S.C. § 933) on Guantánamo (Opp. at 20 n.12), how can the Eleventh Circuit insist that the First and Fifth Amendments do not apply there?

At a minimum, a ruling of such breathtaking sweep should have been fully briefed and argued, based on a complete District Court record. Instead, the Panel announced its overbroad dicta on an expedited interlocutory appeal in which the narrow issue before the Panel was the refugees' right to resist coerced repatriation. The Government's own arguments thus provide further basis to doubt the Eleventh Circuit's judgment, and for this Court to exercise its equitable power of vacatur.

D. *Departure from the Accepted Course of Judicial Proceedings:* Finally, vacatur is warranted because the Panel blatantly departed from the accepted course of judicial proceedings by ignoring its own en banc opinion in *Jean v. Nelson*, 727 F.2d 957, 981-82 (11th Cir. 1984). Pet. at 20-21. *Jean* held that detainees' American "counsel have a first amendment right

to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration...." *Id.* at 983. Without following, distinguishing, or even mentioning that precedent, the First Amendment part of the Panel opinion held that American attorneys have *no* independent First Amendment right to counsel their clients unless "the Cuban ... migrants have any of the statutory or constitutional rights ... that might sustain the attorneys' claims to [a First Amendment] right of association," Pet. App. at 29a, the opposite of what *Jean* had in fact held. See Pet. at n. 11.[16]

By flouting Eleventh Circuit precedent, the Panel violated not just internal Circuit law, but also this Court's core First Amendment precedents. The Panel's demand that a *client* have an underlying legal claim before the First Amendment applies to his *lawyer's* speech denies the First Amendment rights of legal services organizations to engage in the very litigation that might lead to judicial recognition of their members' legal rights.

In sum, the important public and national interests at stake, the acknowledged split between the decision below and prior decisions of courts in the Second Circuit, the Panel's erroneous rulings on important questions of constitutional law, and the Panel's gross departure from the accepted course of judicial proceedings all establish both the "certworthiness" that the Government erroneously demands, and Petitioners' equitable entitlement to the remedy of vacatur.

CONCLUSION

For the foregoing reasons and those set forth in our petition, the petition for a writ of certiorari should be granted, the Eleventh Circuit's opinion and order of January 18, 1995 and judgment of April 27, 1995 should be vacated as moot under *U.S. v. Munsingwear*, 340 U.S. 36, 39-41 (1950), and the case remanded to the Eleventh Circuit with instructions to dismiss the judgment.

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[16]The Government now claims that the Eleventh Circuit in *Jean* "did not resolve the First Amendment issue presented there, but instead remanded the matter so that the district court could address the issue in the first instance." Opp. at 23. In fact, the Court of Appeals did not remand the case to the district court to address the First Amendment issue in the first instance, but solely to develop a *factual record* with regard to the constitutional claim that it had just upheld. *See* 727 F.2d at 983-84.

Respectfully submitted,

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